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No. 03-638

Supreme Court, U.S.
FILED
DEC 19 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LIBERTY MUTUAL INSURANCE CO.,

Petitioner,

v.

CALDWELL TRUCKING GROUP PRP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF; AND *AMICI CURIAE* BRIEF OF THE COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER

THOMAS W. BRUNNER
LAURA A. FOGGAN*
VALERIE E. GREEN
CALEB P. BURNS
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Attorneys for Amici Curiae Complex Insurance Claims Litigation Association and American Insurance Association

**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Complex Insurance Claims Litigation Association ("CICLA") and the American Insurance Association ("AIA") submit this motion for leave to file an *amici curiae* brief in support of Petitioner Liberty Mutual Insurance Company ("Petitioner") pursuant to Supreme Court Rule 37.2(b). The *amici curiae* brief of CICLA and AIA presents relevant information beyond the scope of the submissions of the parties to this case and focuses on the potential significance of this case to numerous others beyond the Petitioner and the Respondent. Through their participation, CICLA and AIA seek to provide "unique information or perspective that can help the court." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see also Miller-Wohl Co. v. Comm'r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) ("the classic role of *amicus curiae* [is to] assist[ ] in a case of general public interest, supplement[ ] the efforts of counsel, and draw[ ] the court's attention to law that escaped consideration").

As required by Supreme Court Rule 37.2(a), CICLA and AIA sought the consent of the parties to file this *amici curiae* brief. Petitioner consented to the filing of a brief by *amici curiae* CICLA and AIA.[1] This motion is necessary, however, because Respondent Caldwell Trucking Group PRP ("Respondent") withheld its consent to the appearance of CICLA and AIA as *amici curiae*.

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[1] The letters from counsel for Petitioner consenting to the filing of this brief *amici curiae* have been filed in the office of the Clerk.

CICLA is a national association of insurers, whose members underwrite a substantial portion of the liability insurance in the State of New Jersey and across the nation. CICLA frequently represents the interests of its members as an *amicus curiae* in federal courts. Indeed, CICLA – and its predecessor the Insurance Environmental Litigation Association – have filed over 600 briefs *amicus curiae*. In addition, CICLA participated in this case as an *amicus curiae* before the New Jersey Supreme Court. CICLA is therefore uniquely situated to assess and explain the potential ramifications of the New Jersey Supreme Court's decision for insurers throughout the country.[2]

The American Insurance Association, founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing over 400 companies writing property and casualty insurance in every state and jurisdiction of the United States. The purposes of AIA are to promote the economic, legislative, and public standing of its members; to provide a forum for discussion of policy problems of common concern to its members and the insurance industry; to keep members informed of regulatory and legislative developments; and to serve the public

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[2] This brief is submitted on behalf of CICLA member companies Farmers Insurance Group, Hartford Insurance Group, Royal & SunAlliance, Selective Insurance Company of America, St. Paul Fire & Marine Insurance Company, The Travelers Indemnity Company, and Zurich American Insurance Company. This brief is not submitted on behalf of CICLA member companies ACE Group of Insurance and Reinsurance Companies, American International Group Insurance Companies, Chubb & Son – a division of Federal Insurance Company, or Continental Casualty Company. Although Petitioner is a member of CICLA, it has not contributed financially to the preparation or submission of this brief, and this brief is not submitted on its behalf.

interest through appropriate activities including the promotion of safety and security of persons and property. AIA is headquartered in Washington, D.C., maintains five regional offices, and retains legislative counsel in every state. Among its other activities, AIA files *amicus curiae* briefs in cases before state and federal courts on issues of importance to the insurance industry.

CICLA's and AIA's members have a vital interest in the legal issues presented by this case. This *amici curiae* brief focuses on the question whether the New Jersey Supreme Court, or any other court, has the authority to disregard clear language in a contract of insurance absent a compelling competing interest. This question is of the utmost importance to CICLA's and AIA's members and to the insurance community at large. CICLA and AIA submit this brief to demonstrate that the opinion of the New Jersey Supreme Court threatens the due process rights of the parties to a contract, as well as long-standing common law and state law principles of contract interpretation. The analysis presented by this *amici curiae* brief extends beyond the scope of the applicability and enforceability of the specific contract provision, the non-cumulation clause in Petitioner's insurance policy, which is at issue in this case and which is at the heart of the arguments set forth by the Petitioner and the Respondent.

CICLA and AIA submit this brief to supplement the presentations of the parties and provide a national perspective from the insurer's standpoint on the potential impact of the New Jersey Supreme Court's decision in this case. Certiorari is necessary to correct the erroneous decision of the New Jersey Supreme Court and to prevent the violation of due process and the erosion of well established principles of contract law that may occur if the

decision of the New Jersey Supreme Court is allowed to stand. In light of the implications of this case for the members of CICLA and AIA and the insurance industry at large, CICLA and AIA respectfully request leave of the Court to file the attached *amici curiae* brief in support of Petitioner.

Respectfully submitted,

THOMAS W. BRUNNER
LAURA A. FOGGAN*
VALERIE E. GREEN
CALEB P. BURNS
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Attorneys for Amici Curiae Complex Insurance Claims Litigation Association And American Insurance Association

**Counsel of Record*

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BRIEF OF COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND AMERICAN INSURANCE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This *amici curiae* brief is submitted on behalf of the Complex Insurance Claims Litigation Association ("CICLA") and American Insurance Association ("AIA"). Petitioner Liberty Mutual Insurance Co. has consented to CICLA's and AIA's filing of this brief. Respondent Caldwell Trucking Group PRP has withheld consent. A motion for leave to file an *amici curiae* brief under Supreme Court Rule 37.2(b) is included with this brief. The letters from counsel for Petitioner consenting to the filing of this *amici curiae* brief have been filed in the office of the Clerk.

INTEREST OF *AMICI CURIAE*[1]

The Complex Insurance Claims Litigation Association is a trade association of major property and casualty insurance companies.[2] CICLA is vitally interested in this

[1] This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amici curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] This brief is submitted on behalf of CICLA member companies Farmers Insurance Group, Hartford Insurance Group, Royal & SunAlliance, Selective Insurance Company of America, St. Paul Fire & Marine Insurance Company, The Travelers Indemnity Company, and Zurich American Insurance Company. This brief is not submitted on behalf of CICLA member companies ACE Group of Insurance and Reinsurance Companies, American International Group Insurance Companies, Chubb & Son – a division of Federal Insurance Company,

(Continued on following page)

case because its members underwrite a substantial portion of the liability insurance in the State of New Jersey and nationwide. The American Insurance Association is a national trade organization representing more than 400 companies writing property and casualty insurance in every state and jurisdiction of the United States. AIA companies are affiliated with 79,000 independent insurance agents nationwide. The purposes of the AIA are to promote the economic, legislative and public standing of its members and the insurance industry; to provide a forum for discussion of problems which are of common concern to its members; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. Thus, the outcome of this case has far-reaching implications for AIA's members.

In this case, the New Jersey Supreme Court abrogated a clear contractual limitation because it conflicted with what the court broadly deemed to be in the public interest. Furthermore, the legal precedent established by *Spaulding Composites Co. v. Aetna Casualty & Surety Co.*, 819 A.2d 410 (N.J. 2003), is applicable not just to the contract provision that was invalidated in that case by the Supreme Court of New Jersey; it will be cited to justify invalidating other unambiguous provisions in insurance and other types of commercial contracts in violation of the contracting parties' due process rights.

Continental Casualty Company, or Liberty Mutual Insurance Company (hereinafter referred to as "Liberty Mutual").

As a result of their broad memberships and extensive experience as advocates for insurers nationwide, CICLA and AIA offer a broader perspective than the parties on the potential impact of the issues presented here. Allowing a court to disregard plain insurance contract language in favor of perceived public interest concerns could have a material negative effect on the insurance industry. At the expense of constitutionally-protected reliance interests, the decision below introduces uncertainty – and potential bias – into the enforcement of insurance contract terms. This, in turn, may affect the affordability and availability of insurance coverage.

Through participation as an *amici curiae*, CICLA and AIA seek to supplement the presentations of the parties and provide a national perspective from the insurers' standpoint on the potential impact of this New Jersey Supreme Court decision. Since its inception in 1986, CICLA – and its predecessor, the Insurance Environmental Litigation Association – have filed over 600 briefs *amicus curiae* in complex insurance cases. As a national trade organization, AIA has special expertise in, and knowledge of, disputes concerning insurance coverage and extensive experience in addressing issues of contract interpretation related to property insurance issues. Therefore, CICLA and AIA are uniquely situated to assess and explain the potential ramifications of the New Jersey Supreme Court's decision for cases throughout the country, as well as the ultimate effect of that decision on the nation's insurance coverage market.

SUMMARY OF ARGUMENT

This case does not present a one-time question of contractual interpretation, and it is not a challenge to a state court's effort to discern the meaning of ambiguous contract language. Instead, it addresses an assault by a state high court on the sanctity of contract itself. In this case, the New Jersey Supreme Court expressly substituted what it thought to be "fair" for that which was contractually agreed. In so doing, it violated the due process rights of the Petitioner and abandoned generations of established contract law precedent.

Contract interpretation is a matter of law. If the New Jersey Supreme Court's decision is allowed to stand, however, it will be relied upon to justify departure from clear contract terms in insurance and other commercial agreements whenever a court believes a different result is more equitable. This case's genesis in commonplace commercial litigation between two companies should not conceal the fact that it presents a significant repudiation of courts' duty to enforce contracts as written.

ARGUMENT

I. THE CONSTITUTION REQUIRES COURTS TO ENFORCE CONTRACTS AS THEY ARE WRITTEN AND OUR COMMERCIAL SYSTEM DEPENDS UPON JUDICIAL RESPECT FOR THIS PRINCIPLE.

In *Spaulding*, the New Jersey Supreme Court set aside unambiguous language in an insurance contract because, in its view, the policy, as written, was not "fair." 819 A.2d at 422. In so doing, the New Jersey Supreme

Court forthrightly stated that one of its prior decisions "eliminated reliance on particular contract language (other than limits and exclusions) and on traditional rules of interpretation." *Id.* at 420. The New Jersey Supreme Court's decision is a dramatic and ultimately dangerous departure from long-standing rules of contract interpretation.

As this Court long-ago held, "[t]he general rule is that competent persons shall have the utmost liberty of contracting and . . . their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931). This principle, grounded in the Contract Clause of the U.S. Constitution, U.S. Const. art. I, § 10, cl. 1, and in constitutional guarantees of due process, U.S. Const. amend. V and XIV,[3] applies fully to insurance contracts:

> As a general rule, parties to a contract are bound by its provisions and an insured is entitled only to the coverage for which he contracted; it is not the function of a court to rewrite insurance policies so as to provide coverage which the court might have considered more equitable.

Cornellier v. Am. Cas. Co., 389 F.2d 641, 644 (2d Cir. 1968). Thus, both the U.S. Constitution and settled principles of contract law forbid courts from abrogating contract terms absent compelling reasons in limited circumstances.

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[3] *See* Petition for Writ of Certiorari at 17-21, *Liberty Mut. Ins. Co. v. Caldwell Trucking PRP Group*, No. 03-638, for a more detailed analysis of the Contract Clause and due process implications of this case.

When courts disregard clear contract limitations on the scope of an insurer's liability, they are departing from the settled principles of contract law and due process that guarantee parties the right to enter into contracts and to rely on courts to enforce their terms. Further, when a court fails to adhere to these principles – as the New Jersey Supreme Court did in *Spaulding* – it not only harms the litigant in that case, it also undercuts the entire system of liability insurance. As one court has stated:

> [O]ur commercial system depends on the ability of parties to contract with certainty. Were courts free to refuse to enforce contracts as written on the basis of their own conceptions of the public good, the parties to contracts would be left to guess at the content of their bargains, and the stability of commercial relations would be jeopardized. . . . The insurance contract . . . represents a conscious calibration of risks. [The insured] bargained with [the insurer], and paid premiums to [the insurer], on the basis of the allocation of risk in the policy as written. The [lower] court's decision, however, negates their bargain and leaves the parties guessing as to how the courts will decide a question on which, as the authorities cited by the district court make clear, reasonable minds may differ. . . . [Such a result] would destroy to a large extent the certainty on which our commercial system depends.

St. Paul Mercury Ins. Co. v. Duke Univ., 849 F.2d 133, 135-37 (4th Cir. 1988).

Contract interpretation – including the interpretation of insurance policies – is a matter of law, not of equity. *Oritani Sav. & Loan Ass'n v. Fid. & Deposit Co.*, 989 F.2d 635, 638 (3d Cir. 1993). Thus, while it is true that certain equitable considerations, such as public policy, may be

weighed in the context of contractual disputes, public policy may be relied upon to override contract language only in very limited contexts and only for compelling reasons.

This Court has made clear that the right to override contract language in favor of public policy considerations is a narrow one. As this Court held,

> The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests. . . . [Contract language] may not be held invalid, in the absence of a clear showing that some definite public detriment will probably result from its performance.

Twin City, 283 U.S. at 356-58. In *Patton v. United States*, 281 U.S. 276, 306 (1930), the Court recognized that "the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection."

Public policy considerations are sufficient to override clear contract language only in rare settings implementing fundamental public health, safety, moral concerns, or welfare. "A court may proclaim itself to be the voice of the public only when 'a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it.'" *Shelby Cas. Ins. Co. v. Statham*, 158 F. Supp. 2d 610, 614 (E.D. Pa. 2001) (declining to invalidate insurance policy provision on public policy grounds) (quoting *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941)). *See also Cont'l Cas. Co. v. Allen*, 710 F. Supp. 1088,

1098 (N.D. Tex. 1989) (declining to find insurance contract provisions violative of public policy); *United States v. King*, 840 F.2d 1276, 1283 (6th Cir. 1988) (contract by which parents consented in advance to the physical abuse of their children void as against public policy); *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548 (3d Cir. 2002) (doctrine of public policy voids a contract term that violates laws against racial discrimination); *Fid. & Deposit Co. v. Conner*, 973 F.2d 1236, 1241 (5th Cir. 1992) (enforcing a regulatory exclusion in an insurance contract because "[a]lthough contractual agreements may be invalidated on grounds of public policy, public policy opens only a narrow exception within this general rule – an exception to be applied cautiously and only in plain cases involving dominant public interests.").

State courts, including New Jersey's, have articulated similar standards for the consideration of when "public policy" may nullify contract terms. Under principles articulated by New Jersey courts in the past, invalidating the unambiguous language of a contract on public policy grounds requires a high and unusual showing: the clause must be "patently offensive or inimical to the public welfare and have a clear capacity to support or encourage conduct which is deleterious, anti-social or unlawful." *Rotwein v. Gen. Accident Group*, 247 A.2d 370, 376 (N.J. Super. Ct. Law Div. 1968), *quoted in Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395, 401 (N.J. 1985); *see also Summit Assocs., Inc. v. Liberty Mut. Fire Ins. Co.*, 550 A.2d 1235, 1239 (N.J. Super. Ct. App. Div. 1988) (reversing and quoting trial court holding that "the health, safety and welfare of the people of this State must outweigh the express provisions of the insurance policy in issue").

In the specific context of environmental insurance coverage, the New Jersey Supreme Court in *State v. Signo Trading International, Inc.*, 612 A.2d 932, 940 (N.J. 1992), said that "public policy considerations alone are not sufficient to permit a finding of coverage in an insurance contract when its plain language cannot fairly be read to provide that coverage." The California Supreme Court similarly has held: "While we agree that it is in everyone's best interests to have hazardous wastes cleaned up, we do not agree that a . . . court may rewrite an insurance policy for that purpose or any purpose." *Rosen v. State Farm Gen. Ins. Co.*, 70 P.3d 351, 356 (Cal. 2003) (internal citations omitted). Moreover, "there is a strong public policy in favor of allowing insurers to enforce unambiguous policy provisions, thereby encouraging stability in the insurance industry and allowing insurers the benefit of the bargain created by such unambiguous language." *Id.* at 359 (Moreno, J., concurring). Most courts agree. *See, e.g.*, *Slayko v. Sec. Mut. Ins. Co.*, 774 N.E.2d 208, 211-12 (N.Y. 2002) (Courts should be "reluctant to inhibit freedom of contract by finding insurance policy clauses violative of public policy") (internal citations omitted); *Prudential Prop. & Cas. Ins. Co. v. Jefferson*, 185 F. Supp. 2d 495, 498 (W.D. Pa. 2002) (rejecting argument that household exclusion provision in automobile insurance contract violates public policy).

Here, however, the New Jersey Supreme Court invalidated an insurance policy term without any explanation of why it was appropriate to depart from settled constitutional and contract principles. Rather than honor the bedrock principles protecting parties' right to contract as they see fit and the reliance interests of Petitioner, the *Spaulding* court simply imposed its own view of what

would be the "right" result in a contractual insurance coverage case.

II. THE NEW JERSEY SUPREME COURT DISREGARDED FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL DUE PROCESS AND CONTRACT LAW.

Almost twenty years after the parties entered into the insurance contracts at issue in *Spaulding*, the New Jersey Supreme Court essentially rewrote the agreed-upon terms of their insurance contracts as if crucial language governing the parties' rights and obligations had never existed. In nullifying language of the policy, the New Jersey Supreme Court disregarded the well-established framework requiring unambiguous contracts to be enforced according to their terms and overridden by public policy concerns only in highly unusual and limited circumstances.

Specifically, the New Jersey Supreme Court viewed the contract through the lens of one of its prior decisions, *Owens-Illinois, Inc. v. United Insurance Co.*, 650 A.2d 974 (N.J. 1994), and the court's previously articulated goal of maximizing insurance coverage for environmental cleanup.[4] The public policy considerations articulated in

[4] Perhaps the result in *Spaulding* was motivated by the Court's desire to extend the reach of its own earlier decision in *Owens-Illinois*. In *Spaulding*, the New Jersey Supreme Court pointed to its own decision in *Owens-Illinois* as an important ruling: "As scholars and treatise writers, without exception, have concluded, *Owens-Illinois* was a 'watershed' in the cripplingly complex area of long-tail environmental exposure insurance coverage." *Spaulding*, 819 A.2d at 419.

Owen-Illinois are insufficient to justify rewriting the language of the Liberty Mutual policy at issue in this case. *See Goodwin v. George Fischer Foundry Sys., Inc.*, 769 F.2d 708, 712 (11th Cir. 1985) (rejecting argument that state supreme court decision is "evidence of such a strong public policy that the [contract provision at issue] should not be applied"). The court cannot opt to ease the burden on New Jersey citizens or shift the cost of society's systemic problems (such as cleaning up pollution) to insurers by ignoring constitutional considerations requiring it to enforce the unambiguous terms of a contract. The New Jersey Supreme Court, like all courts, must be bound by the constitutional principles that permit public policy to override unambiguous contract language only after a searching analysis and in very narrow circumstances.

With stunning candor, the *Spaulding* court admitted that "even if the non-cumulation clause was not facially inapplicable, we would not enforce it because it would thwart. . . . a public policy that favors maximizing, in a fair and just manner, insurance coverage for cleanup of environmental disasters." *Spaulding*, 819 A.2d at 422. The court ultimately struck the clause to ensure, in its own estimation, that the Petitioner did not "avoid its fair share of responsibility" because "[b]y applying the non-cumulation clause, insurers who were actually 'on the risk' would be insulated from their fair share of liability." *Id.* But, the New Jersey courts, and other courts faced with deciding how to apply the unambiguous terms of insurance contracts, are not roaming the land of equity looking for a way to impose their own version of "fair"; they are resident in the land of law in which contracts are to be enforced.

Additionally, the result reached by the New Jersey Supreme Court does not comport with the common understanding of fairness or the constitutional guarantee of due process. It changed the scope of the insurer's liability from that prescribed by contract to what the court abstractly deemed to be "fair" without even a reference to a rule of law or a compelling justification. The Petitioner was "on the risk" for exactly the type of coverage provided in the policy and nothing more. The policy provision that the court erased did not authorize criminal conduct, implement racial discrimination or violate other important societal norms; it limited the amount the insurer can be called on to pay. The court's holding does exactly what New Jersey common law has counseled against: it "write[s] for the insured a better policy of insurance than the one purchased." *Harleysville Ins. Cos. v. Garitta*, 785 A.2d 913, 917 (N.J. 2001).

The New Jersey Supreme Court's departure from its own settled tenets of New Jersey contract law has deprived the Petitioner of millions of dollars without due process of the law. The Petitioner's settled expectation that the courts would interpret its insurance contracts as written is now nothing but wishful thinking. And, of course, Petitioner is far from alone.[5] All insurers now stand at risk that the New Jersey courts will henceforth

[5] Moreover, the due process harm to the Petitioner is not just limited to this case, but extends to every claim by every insured who paid a discounted price in exchange for the inclusion of a non-cumulation clause in their policy. Citing this case, other insureds will now seek to escape the limits of the non-cumulation clause of any insurance policy issued by the Petitioner.

alter their contracts to award policyholders extra-contractual coverage that judges feel to be "fair." Thus, the New Jersey Supreme Court's actions have made possible a recurring violation of federal due process principles that can be remedied only through this Court's review.

Indeed, the New Jersey high court previously has displayed a proclivity for departing from the clear terms of insurance policies to impose broad liability on insurers where none would otherwise exist. In *Morton International, Inc. v. General Accident Insurance Co.*, 629 A.2d 831 (N.J. 1993), *cert. denied*, 512 U.S. 1245 (1994), the New Jersey Supreme Court held unenforceable a standard pollution exclusion that had been part of many insurance agreements since 1970. The Court's decision in *Morton* was particularly egregious because it expressly "decline[d] to enforce the standard pollution exclusion clause as written" even though the New Jersey insurance regulators had approved the clause. 629 A.2d at 848.[6]

Decisions such as *Spaulding* and *Morton* are even more troubling because they signify a dramatic departure from the standards that New Jersey courts state must govern questions of contract interpretation. New Jersey

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[6] New Jersey, and most other states, have regulatory agencies that review insurance policy provisions. If the state is concerned about a particular provision, then the state is able to address the provision through its oversight mechanism. In what is already a heavily regulated industry, state court intervention in the vein of *Spaulding* is not only unnecessary, but can cause disruption. The *ex post facto* nature of judicial review necessarily means that when a court alters the terms of an insurance policy, it does so after the policy has been executed and relied upon.

courts have stated in the past that New Jersey insurance contract law requires parties to be bound by the plain terms of an insurance policy. *See Am. Motorists Ins. Co. v. L-C-A Sales Co.*, 713 A.2d 1007, 1013 (N.J. 1998) ("we adhere to the principle that an insurance policy should generally be interpreted according to its plain and ordinary meaning" (internal quotations omitted)); *Flynn v. Hartford Fire Ins. Co.*, 370 A.2d 61, 63 (N.J. Super. Ct. App. Div. 1977) ("when the policy of insurance is clear and unambiguous, it has long been the law of this State that the court is bound to enforce the policy as it is written"); *Harleysville Ins. Cos. v. Garitta*, 785 A.2d 913, 917 (N.J. 2001) ("In the absence of any ambiguity, courts should not write for the insured a better policy of insurance than the one purchased." (Internal quotations omitted)). New Jersey also claims to recognize that these contract interpretation principles are critically necessary to sustain the viability of the insurance industry. *See Zacarias v. Allstate Ins. Co.*, 775 A.2d 1262, 1270 (N.J. 2001) ("Insurance contracts are . . . issued to assist individuals to plan rationally for the unforeseen challenges of an unpredictable future. For such transactions to be sustainable, both sides must be able to rely on the plain meaning of the contracts into which they respectively enter."). Yet, somehow, despite these precedents, the decision of the New Jersey Supreme Court in *Spaulding* is only the latest in a series of decisions from this court that upend these long-settled principles and the contracts predicated on them in the name of "fairness" that allows New Jersey courts to impose large additional liabilities on insurers in sensitive, costly areas like environmental pollution based on the subjective preferences of judges.

This problem is also seen in other cases where judges are asked to hold insurers liable for costs of remedying a broad array of societal problems. For instance, *Spaulding* is analogous to the California lower court decisions in *Rosen v. State Farm General Insurance Co.*, 70 P.3d 351 (Cal. 2003), which addressed whether a homeowner's insurer whose contract terms covered the actual "collapse" of the insured property, or a part thereof, should be required to pay for repairs to avoid the imminent collapse of a deck. The trial court in *Rosen* declared that there should be coverage "for collapse as long as the collapse is imminent, *irrespective of policy language*." 70 P.3d at 353 (emphasis in original). The intermediate Court of Appeal agreed with the trial court and affirmed its decision. *See Rosen v. State Farm Gen. Ins. Co.*, 120 Cal. Rptr. 2d 373 (Cal. Ct. App. 2002). Ultimately, the California Supreme Court reversed, finding that: "In rewriting the coverage provision to conform to their notions of sound public policy, the trial court and the Court of Appeal exceeded their authority, disregarding the clear language of the policy and the equally clear holdings of this Court." *Id.* at 355. As the California Supreme Court explained:

> [W]e do not rewrite any provision of any contract . . . for any purpose. To do so . . . might have untoward effects generally on individual insurers and individual insureds and also on society itself. Through the standard policy, individual insurers made promises, and individual insureds paid premiums, against the risk of loss. To rewrite the provision . . . might compel insurers to give more than they promised and might allow insureds to get more than they paid for, thereby denying their "general[ ] free[dom] to contract as they please[ ]."

Id. at 356 (quoting *Certain Underwriters at Lloyd's of London v. Superior Court*, 16 P.3d 94, 108 (Cal. 2001)) (internal quotations and citations omitted).

Spaulding, Morton, and *Rosen* illustrate the tendency in New Jersey and some other states to interfere with the right to contract by setting aside clear policy language in favor of amorphous public policy considerations. In this realm, free of the restraint of contract terms, there is a serious risk of bias against insurers and others perceived as "deep pockets." In CICLA's and AIA's experience, courts sometimes are tempted, notwithstanding insurance contract terms, to shift from a governmental entity or local business to its insurers the burden of cleaning up pollution or compensating individuals harmed by a company's products or conduct.

In particular, state court judges – especially elected state court judges – face pressure from many quarters to decide cases at the expense of out-of-state insurance companies. As one commentator concluded, many "supreme tribunals allow extralegal factors, which have little to do with the merits of the suits, to influence the disposition of insurance-related cases." *See* Willy E. Rice, *Judicial Bias, The Insurance Industry And Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad-Faith, Breach-Of-Contract, Breach-Of-Covenant-Of-Good-Faith And Excess-Judgment Decisions, 1900-1991*, 41 Cath. U. L. Rev. 325, 331 (Winter 1992). In this case, that tendency has resulted in an error in violation of the mandates of due process.

III. SUPREME COURT REVIEW IS NECESSARY BECAUSE ENFORCING UNAMBIGUOUS CONTRACT PROVISIONS IS CRITICAL TO THE STABILITY OF THE INSURANCE SYSTEM.

Adherence to the plain meaning of insurance contracts allows the insurance market to function properly. Insurance companies and other businesses throughout New Jersey and the nation conduct their affairs based on the expectation that the courts will enforce the contracts they enter into as they are written. Judicial fidelity to the basic principles of due process and contract law is critical to the confidence of insurers in the marketplace.

Insurers must rely on contract predictability to assess their risk in entering into an insurance policy. Across large numbers of policyholders, risk of loss such as fire, automobile collisions, and the like can be actuarially predicted. The risk of a judge concluding that a contractual provision is not "fair" cannot be. State regulatory and statutory schemes require insurers to predict their risk in order to charge product premiums and set aside appropriate reserves. To do this, insurers need to know that the parties to an insurance contract enjoy the same rights of due process and the same legal protections as do parties to other commercial contracts.

The New Jersey Supreme Court's ruling in *Spaulding* does not affect the Petitioner alone. It affects all insurers by injecting uncertainty into their ability to rely on courts to enforce insurance contracts even-handedly and as a matter of law, and not abrogate unpopular terms in favor of what they perceive to be a better result.

CONCLUSION

For the foregoing reasons, CICLA and AIA respectfully submit that the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

THOMAS W. BRUNNER
LAURA A. FOGGAN*
VALERIE E. GREEN
CALEB P. BURNS
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Attorneys for Amici Curiae Complex Insurance Claims Litigation Association and American Insurance Association

**Counsel of Record*

December 19, 2003